
U.S. Department of Labor
Office of Administrative Law Judges
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DATE ISSUED: January 16, 1987

CASE NO.: 86-ERA-26

MARVIN LLOYD VAN BECK
Complainant

v.

DANIEL CONSTRUCTION COMPANY
Respondent

Michael Okun, Esq.
For the Complainant

Melvin Hutson, Esq.
For the Respondent

BEFORE: JOHN C. BRADLEY
Administrative Law Judge

DECISION RECOMMENDING AWARD OF ATTORNEY FEES

I

BACKGROUND

This proceeding involved a claim seeking redress in accordance with the provisions of Title 42 U.S.C. § 5851 which prohibit a Nuclear Regulatory Commission [NRC] licensee

from discharging or otherwise discriminating against an employee by reason of his participation in an activity protected under the statute.

On 4/22/85, Complainant was hired as an Electrical Raceways Inspector by Daniel Construction Company [Daniel] then engaged, under a contract with Carolina Power & Light Company [CP&L] in the construction of the Shearon Harris Nuclear Power Plant southwest of Raleigh at or near New Hill, NC. At the time CP&L was an applicant for an operating license to be issued by the NRC.

On 1/21/86, citing fears for his own safety, Complainant refused to accept a work assignment in the Reactor Containment Building which, at the time, was being subjected to so-called "hot function testing". He was terminated later the same day, and this proceeding followed.

Formal hearings were held in Raleigh, NC, on 5/28-29/86, at which time documentary evidence was offered, and oral testimony was elicited from a total of 13 witnesses. Post-hearing briefs were filed by the parties, and, under date of 8/26/86, a request was issued for supplemental briefs identifying "the specific NRC safety regulation or statutory provision relevant to Complainant's refusal to perform inspections while hot function testing was in progress." Each party thereafter filed a document which purported to respond to the request. On 9/17/86 a Recommended Decision and Order was issued providing for certain relief, including reinstatement in Complainant's former position, compensation for lost pay and compensation for litigation expenses, including payment by Daniel of reasonable attorney fees. Complainant thereby qualified as the prevailing party, subject to possible review by the Secretary of Labor.

Title 42 U.S.C. § 5851(b)(2)(B) provides in pertinent part, as follows:

> "If an order is issued under this paragraph, the Secretary, at the request of the complainant shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued."

Under date of 10/9/86, Complainant's counsel, Michael G. Okun [Okun], Esq., submitted several documents which, in the aggregate, constitute an application for the award of attorney fees and expenses. Included are a listing of what appear to be apposite time book entries on various dates between 4/23/86 and 10/7/86, and an affidavit by J. Anthony Penry, Esq., attesting to prevailing hourly rates in the Raleigh area. Okun seeks repayment of certain expenses in the amount of $840.29, and payment for 209.5 hours[1] of work on the case at the rate of $100.00 per hour.

Under date of 10/4/86, Daniel responded, postulating that the appropriate hourly rate is $90.00, that the number of hours logged by Okun was excessive, and that the lack of adequate time descriptions forces one to resort to mere speculation in appraising the merits of the fee application.

Under date of 11/14/86, Okun filed a Reply, urging acceptance of the $100.00 rate and defending the total number of hours logged as necessary, productive, and, therefore, justified.

Daniel has suggested that an award of attorney's fees might appropriately be held in abeyance pending appeal of the aforesaid recommended decision. However, one can imagine a scenario wherein Complainant prevailed on the appeal, an attorney's fee was then awarded, and a second appeal grew out of the award. In the interest of judicial economy, the better course is to go forward with the recommended award and allow any resulting appeal to be resolved simultaneously with the appeal on the merits.

II

FACTORS TO BE CONSIDERED IN RESOLVING AWARD ISSUES

While Okun cited a decision of an Administrative Law Judge [ALJ] in *English v. General Electric Company*, 85-ERA-2,[2] involving the same statute here involved, the others referred to by the parties and those identified by independent research involve attorneys fees pursuant to statutes other than 42 U.S.C. § 5851, principally the Civil Rights Act of 1964, 42 U.S.C. § 2000, et seq. Because they involve like considerations, however, such decisions are deemed to be valid precedent in this proceeding.

It is generally acknowledged that, in fee request controversies, the

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prevailing plaintiff or complainant (more realistically, his counsel) has the burden of proving entitlement to payment of legal fees and expenses by the non-prevailing opponent, *Webb v. Board of Education of Dyer County*, 105 S.Ct. 1923, 1928-1929 (1985); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 720 (CA5 1974); *Daly v. Hill*, 790 F.2d 1071, 1079 (CA4 1986).

A fee request should not result in a second major litigation, *Daly, supra*, 790 F.2d at 1078; *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). Nor is it necessary that a fee award achieve technical perfection in order for the results to fall within the area of discretion assigned to the trier of the facts, *Daly, supra*, 790 F.2d at 1080, 1082 -- which is to say that the trier of fact need not get enmeshed in a meticulous analysis of every detailed fact, *Copeland v. Marshall*, 641 F.2d 880, 903 (CA D.C. 1980); *Lindy Brothers Builders, Inc. v. American Radiator, Etc.*, 540 F.2d 102, 116 (CA3 1976) [Lindy II]. The objective in providing for assessment of legal fees and other costs related to the litigation

is not "to make prevailing counsel rich", but rather, as a matter of public policy, to enable litigants to obtain competent counsel, *Johnson, supra*, 488 F.2d at 719.

In the *Johnson* case, the Fifth Circuit excogitated 12 criteria[3] to be utilized in weighing the merits of an attorney fee request, these being:

(1) The time and labor involved,
(2) The novelty and difficulty of the questions,
(3) The skill requisite to perform the legal service properly,
(4) The preclusion of other employment by the attorney due to acceptance of the case,
(5) The customary fee,
(6) Whether the fee is fixed or contingent,
(7) Term limitations imposed by the client or the circumstances,
(8) The amount involved and the results obtained,
(9) The experience, reputation and ability of the attorney,
(10) The "undesirability" of the case,
(11) The nature and length of the professional relationship with the client, and
(12) Awards in similar cases.

Referring to the *Johnson* criteria, the Fourth Circuit in *Anderson v. Morris*, 658 F.2d 246, 249 (CA4 1981), acknowledged that, "experience has shown, however, that these criteria are difficult to quantify." Similarly, the District of Columbia Circuit has observed that District Judges "have had difficulty applying the Johnson factors", *Copeland*, supra, 641 F.2d at 890. This, in part, may be so because such considerations as the novelty and complexity of the questions presented are but manifestations of the number of hours which reasonably must be expended, *Blum*, supra, 465 U.S. at 898. Similarly, such consideration as the skill required to prevail, and the experience, reputation and ability of an attorney, or the undesireability of a case are merely reflections of those factors bearing upon what constitutes a reasonable hourly rate, *Blum*, supra, 465 U.S. at 898, *Copeland*, supra, 641 F.2d at 892.

The *Johnson* criteria aside, it is now generally recognized that, "'The most useful starting point for determining the most of a reasonable fee is the number of hours *reasonably* expended on the litigation multiplied by a *reasonable* hourly rate" (emphasis added), *Hensley*, supra, 461 U.S. at 433; *Blum*, 465 U.S. at 888; *Anderson*, 658 F.2d at 249. In an appropriate case, adjustments may be made upward or downward on the basis of other factors, *Lindy II*, supra, 540 F.2d at 118; *Anderson*, 658 F.2d at 249; *Hensley*, supra, 461 U.S. at 435, *Blum*, supra, 465 U.S. at 888; *Hyatt v. Heckler*, 586 F. Supp. 1154, 1159 (WD NC 1984).

III

HOURLY RATE ISSUE

Okun has urged acceptance of an hourly rate of $100.00, while Daniel has insisted on $90.00. Reasonable fees are calculated taking into consideration prevailing market rates in the relevant community, *Blum*, supra, 465 U.S. at 895.

Accompanying Okun's initial fee request was the affidavit of J. Anthony Perry, an attorney who practices law in Raleigh, NC. Perry represented that hourly rates in the Raleigh area for non-contingent work by lawyers of Okun's

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experience and qualification ranged from $90.00 to $125.00. A fee of $100.00 per hour in the area of Charlotte, NC, was held to be within the area of discretion of the trial judge in *Jones v. Board of Governors*, 790 F.2d 1120, 1121 (CA4 1986). There was evidence in a 1984 case that the reasonable fee range for a lawyer also in the Charlotte area with 3 or more years experience in federal litigation was $85.00 to $125.00 per hour, *Hyatt v. Heckler*, 586 F. Supp. 1154, 1157 (W.D. N.C. 1984). While Charlotte is not Raleigh, both cities are in the same State, and the undersigned, having often litigated matters in both cities, believes that the practice of law in the two communities is sufficiently comparable that the two cited cases have some value in resolving the hourly rate issue.

In urging acceptance of the $100.00 rate, under date of 10/9/86 Okun presented argument in two separate documents, (a) a memorandum in support of a motion for attorney's fees [M], (b) an accompanying affidavit [A], and later filed (c) a reply to employer's response to Okun's initial filing [R] Among other things, the following factors were urged in favor of acceptance of the requested $100.00 per hour rate:

(1) Okun's *experience* and *reputation* (A-2).
(2) The *quality* of the work performed (M-2).
(3) The *skill* demonstrated by Okun (M-6).
(4) Okun's *preclusion*[4] from working on other matters because of acceptance of responsibility to represent Complainant (A-2, M-6, R-2).
(5) The *contingent* nature of the case (A-3, M-6, R-2).
(6) Okun's *success* on all aspects of the claim (M-8).
(7) The *novelty* and *complexity* of the questions presented (M-5, 6, R-3).[5]
(8) The "great importance" of the principles involved (R-2).

Daniel responded under date of 11/4/86, arguing that Okun graduated from law school in 1980, had thereafter worked as a judge's clerk, had worked for the National Labor Relations Board and for the North Carolina Labor Law Center, and had failed to disclose when he actually entered into private law practice.

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The presentation of Complainant's case at the oral hearing was handled in an efficient manner and with competence. Complainant's initial brief demonstrated a grasp of the issues and was of value in the processes which culminated in the issuance of the recommended decision of 9/17/86. These things considered, as well as the representations of the parties and the level of fees found appropriate in the *Jones* and *Hyatt* cases, supra, Okun's request for a rate of $100.00 is accepted as being within reasonable limits for attorney's fees in the Raleigh area for work comparable to the kind performed by Okun.

IV

THE ISSUED RELATING TO THE HOURS BILLED

A. Categories of Hours Spent

Okun has submitted excerpts from his time records purporting to support a claim for a total of 209.5 hours. Analysis of Okun's time record summary suggests that the hours can be grouped as follows:

Category	No. of Hours
A. Prehearing activities to 5/28/86	118.00
B. Hearing process, 5/28-29/86	18.75
C. Compilation of brief, 6/5-7/31/86	50.50
D. Compilation of supplemental brief, 9/1-5/86	14.25
E. Fee application	7.00
	208.50 hours

B. Inadeguacy of Explanations

Unfortunately, many of the entries are not sufficiently definitive to allow an understanding of just what work was performed. For example, in category A numerous entries refer merely to "research" or to "trial preparation". Of course, it could be said that everything listed in category A was for trial preparation.

A further factor inhibiting a reasonably clear understanding and assessment of Okun's activity prior to the oral hearing is the practice of

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agglomerating two or more separate items within a single time period, sometimes including, among other things, both "research" and "trial preparation," without further

explanation. This practice, too, has made it difficult, if not impossible, to assess accurately the merits of Okun's claim. While it is not necessary to know the exact number of minutes spent, nor the precise activity for every hour spent, nevertheless the trier-of-fact must be given "a great deal of information", *Lindy Brothers Builders, lnc. of Philadelphia v. American R. & S. San. Corp.*, 487 F.2d 161, 167, 169 (CA3 1973).

C. Time Spent Prior to Oral Hearing

In an effort to gain insight, the summary attached a *Appendix A* was prepared. It shows a total of 17.25 hours devoted to contact with Complainant and identifies 7 other occasions when entries indicated, together with other activities, further contact with Complainant. Research and general preparation accounted for approximately 51.75 hours, contact with witnesses other than Van Beck approximately 21.75 hours, four attempted or actual contacts with a Department of Labor [DOL] investigator some 6.25 hours, and mixed entries and miscellaneous some 21 hours.

Okun explained that most witnesses could be reached only later at night (M-4), which suggests that the time so spent did not interfere with his ability to devote more time during normal office hours to other matters. While emphasizing his experience and expertise in the labor law field, Okun also offered as a reason for spending hours on the case the fact that he had not previously litigated a matter under Title 42 § 5851 (R-4), and had to spend time researching law and regulations (R-4). Furthermore, Okun contended (R-3) that he, "was provided nothing from the [DOL] except its recommendation without any supporting data". Yet, he has logged a total of 6.25 hours on 4 separate occasions devoted to contact with one or more DOL investigators.

It is well established that where documentation is inadequate, it may be proper to reduce a requested award accordingly, *Hensley*, supra, 461 U.S. at 433. It is, however, necessary to reach a judgment with respect to how many hours were *reasonably* expended, *Anderson*, supra, 658 F.2d at 249. The figure so reached is not necessarily synonomous with the actual number of hours expended, *Ryan v. Federal Deposit Insurance Corp.*, 24 EPD ¶ 31, 449 (USDC D.C. 1980). Hours not reasonably expended may be excluded, *Hensley*, supra, 461 U.S. at 434; *Daly*, supra, 790 F.2d at 1078; *Copeland*, supra, 641 F.2d at 902.

The deficiencies in Okun's time records are such that it is difficult, if

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not impossible, to be reasonably sure how many of the pre-hearing hours were productively expended. Consequently, it will be necessary to invoke a "billing judgment" to resolve the problem. Based upon experience in private practice extending from 2/15/54 to 4/30/84[6] and, of course, knowledge of the various elements constituting Complainant's presentation garnered during the oral hearing process and when scrutinizing the record during the decision-writing process, it has been concluded that Okun's time records list

hours that were not productive.[7] For example, it is not credible that Okun could have spent 4 *productive* hours on the telephone with Complainant on 4/17/86 and then spent 4 more *productive* hours doing the same thing the next day. Nor is it credible that Okun could have spent 6.25 *productive* hours in consultation with one or more DOL investigators, particularly in the light of Okun's contention that he received nothing of consequence from DOL.

It is conceded that acquisition of an understanding of some of the technical aspects of the Shearon Harris operation required careful inquiry. But once that understanding was acquired, the factual structure confronting Okun was not particularly complicated. The testimony of the 6 electrical raceway inspectors Okun presented to support Complainant was remarkably similar and, in the aggregate, consumed only about 110 transcript pages. The stories they told were simple ones.

All relevant things considered, it is concluded that any pre-hearing hours beyond the number of 75 could not have been productive. Stated somewhat differently, 75 hours of work should have been more than ample time for someone of Okun's self-proclaimed experience and skill to do all those things necessary to prepare the presentation he made herein.

D. Time Spent During the Hearing Process

Okun's time records summary identifies 18.75 hours spent on the hearing days, beginning with the opening of the oral hearing at 9:00 A.M. on 5/28/86. The actual hearing hours shown were as 8 hours on the first day, 3.25 the next, which is deemed to be quite accurate. However, 6 hours were logged for "preparation" after the close of hearing on the first day and before the 3.25 hour hearing the next day. While, absent some logical explanation, the time logged for preparation seems excessive when one considers all the time attributed earlier to "preparation", Okun's representation will, nevertheless, be accepted.

E. Time Spent in Preparation of the Initial Brief

Okun allocated 50.5 hours to the preparation of Complainant's initial brief, including 15.75 hours attributed to review of a transcript approximately some 452 pages in length. While the undersigned reviewed the same transcript in less time, he is not prepared to conclude that any portion of the tire attributed to Okun's brief preparation was non-productive. Accordingly, the representation of 50.5 hours is accepted.

F. Time Spent On Supplemental Brief

Because of what was perceived to be a problem, in resolving a jurisdictional issue, by a request for supplemental briefs dated 8/26/86 further guidance was sought from the

parties, specifically including reference "to the specific NRC safety regulation or statutory provision relevant to" Complainant's refusal to accept a work assignment. The nature of Okun's response can best be evaluated by reproducing the text of footnote number six in the recommended decision of 9/17/86, to wit:

> "When requested to file a supplementary brief identifying specific NRC safety regulations or statutory provisions relevant to Complainant's refusal to perform inspections during HFT Complainant's counsel responded by furnishing without further explanation a copy of 10 CFR SS50 which is comprised of approximately 132 pages. He did not, however, comply with the request for *specific* reference to an applicable statute or regulation."

Despite Okun's contention (R-6) that Complainant had in the supplemental brief "urged a position subsequently adopted by the ALJ", the fact is that Complainant's supplemental brief was of no value in resolving the jurisdictional issue, as is made abundantly clear in the text of the aforementioned recommended decision, page 6. Stated somewhat differently, the 14.25 hours attributed to the supplemental brief were non-productive and should not be considered in computing the fee award.

G. Time Expended In Preparation of Fee Application

Okun allocated 7 hours to the preparation of the application for award of attorney's fees. It appears that time spent in "defending" entitlement to an award of fees has been recognized by the Fourth Circuit as compensable, *Daly*, supra, 790 F.2d at 1080. Similarly, the Supreme Court has allowed an award to include time spent "litigating" a fee application, *Webb*, supra, 105 S.Ct. at 1926, fn 9. Neither Court appears to have differentiated between time spent *preparing* a fee request, and time spent, thereafter, in defending against assault by an opposing party. Accordingly, the 7 hours claimed for preparation

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of the fee application should be approved.

It is concluded that the maximum time *reasonably* expended in connection with the litigation before the Office of Administrative Law Judges [OALJ] is 151.25 hours.

V

THE MATTER OF UPWARD OR DOWNWARD ADJUSTMENT

Study of the decisions cited herein may limn in one's consciousness the fact that, as stated by the *Blum* court, 465 U.S. at 895, fn 11, the task of evaluating reasonable attorney's fees is "inherently difficult". Various Courts have struggled with the problem, attempting to lay down clearcut guidelines for resolving questions related to the matter of

awarding fees to attorneys, a particularly distressing example of resulting futility being the *Copeland* decision.

There, as seems to be generally accepted, the Court referred to a "lodestar" figure computed by multiplying a *reasonable* hourly rate by the number of hours *reasonably* expended.[8] Having discussed how the lodestar figure should be calculated, the Court examined adjustments, finding that such factors as the contingent nature of a fee or the quality of representation may warrant adjustment in the lodestar figure.[9] Such factors, however, would seem to be appropriate considerations to be weighed in determining the reasonableness of an hourly rate, i.e. in arriving at the original lodestar computation. Similarly, the Court acknowledged that some hours expended may have been non-productive, thereby justifying decrease in the lodestar figure. Here, again, the matter of non-productive hours[10] would seem to be a consideration in determining the number of hours reasonably expended, also part of the original lodestar computation process.

Part of the problem would seen to be the apparent compulsion to impose one concept upon another -- the *Johnson* criteria upon the lodestar approach. In this case Okun has urged acceptance of a number of factors as a valid basis for determining that the rate of $100.00 per hour is reasonable. Among them are certain of the *Johnson* criteria, including item 2 through 7, and items 9 and 12. Each of these was considered herein, in finding that the hourly rate proposed by Okun was reasonable.

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Item 1 among the *Johnson* criteria relates to time and labor, and, of course, was considered in concluding that Okun could not have spent 118 *productive* hours on this case prior to the oral hearing.

It is next appropriate to consider whether there are any other considerations which might warrant an upward or downward adjustment. Most of the *Johnson* criteria were weighed in determining the reasonableness of the hourly rate requested by Okun or when reaching a determination concerning the number of hours reasonably expended by him. However, item 8 which relates to the amount involved and the results obtained was not. It is concluded these considerations do not justify adjustment in the figure obtained by multiplying the reasonable rate by the number of hours reasonably expended.

The hours identified in Okun's time record summary numbered 208.5. Of these, it was found that 57.25 hours were non-productive, leaving a remainder of 151.25 hours. Multiplied by the hourly rate, this sum calls for a fee award of $15,125.00.

To the extent that it related to money, the recommended decision called for payment of back pay to Complainant, with interest, and outlined a formula to be utilized in computing the amount of money to be paid out. The ultimate amount involved is not known, since it will be determined by facts largely extrinsic to the record. However, Complainant's base pay was $600.00 per week, from which there was to be deducted the

amount Complainant earned from another job paying $8.00 per hour, or $320.00 for a 40 hour week. Through the end of September, the month in which the recommended decision was issued, this approach would provide for back pay, subject to the adjustments specified, for 36 weeks, the total base sum being $10,080.00.

Complainant testified that, with overtime, Daniel paid him at the approximate rate of $50,000.00 per year. A computatation based upon ,000.00 per week would yield a base figure of $24,480.00 for the 36 week period. Subject to the specific adjustments, it would appear that the monetary value of Complainant's recovery would lie somewhere between $10,080.00 and $24,480.00.[11]

While no great principle would be established by the recommended decision, in addition to attempting to make Complainant whole financially, it did call for certain measures aimed at returning Complainant to his former status without latent potential for damage to his ability to make a living. However, there was nothing so unusual among such provisions that a fee adjustment might be justified.

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A fee award of $15,125.00 would make Okun a principal beneficiary of the litigation in this case. Neither the amount of money involved nor the results obtained justify an upward adjustment.

VI

EXPENSES

It is contemplated that a Complainant's counsel, in addition to the award of a reasonable attorney's fee, should also be entitled to recover for out-of-pocket- expenses encountered as a result of the litigation, Daly, supra, 790 F.2d at 1083-1084. An out-of-pocket expense is one which would not have arisen, but for acceptance and prosecution of the case.

Okun's motion for attorney's fees asks for payment of "costs and expenses" in the amount of $840.29. Exhibit A-2 attached to an accompanying affidavit itemized the expenses in 8 separate categories. Each entry has been carefully considered, and each of the sums shown appears to qualify as an out-of-pocket type of expense and to be reasonable under the circumstances.

VII

THE DELAY FACTOR

The Fourth Circuit has recognized that delay in payment, "necessarily erodes the value of a fee that would have been reasonable if paid at the time the services were rendered", *Daly*, supra, 790 F.2d at 1081. See also *Copeland*, supra, 641 F.2d at 892.

It is common practice for a lawyer to bill a client at the end of each month, with the expectation that payment will be received before the end of the following month. It is also appropriate to bill a client at a significant stage in the course of litigation, one such stage being at the time an initial or recommended decision issued. In the instant situation there is an inherent delay factor in the procedure followed which calls for an oral hearing and, the issuance of a recommended decision which cannot become final unless adopted by the Secretary of Labor. Action by the Secretary may not be completed until a year or more after issuance of the decision recommended by an ALJ.

In such circumstances, controversy has arisen over the question of whether the hourly rate found to be reasonable should be that prevailing at

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the time a lawyer performed the work or that prevailing at the time a decision became final. It has also been argued that, if the former measure is applied, the delay element should be factored into the rate level found to be reasonable. The problem with that approach in the instant circumstance is that there is no reasonably accurate method of determining in advance how many months of delay will be encountered. A more precise, and, therefore, a more fair approach would be to provide for interest to be paid from the date by which a lawyer in more common circumstances would reasonably expect to be paid.

The recommended decision was served on 9/17/86. But for the delay inherent in a procedure which does not make a decision at the trial level final until the Secretary has acted, Okun could reasonably have billed for his services and out-of-pocket expenses by October 1, 1986, and expected payment by November 1, 1986. The more logical way to make adjustment to take into consideration the delay factor is to provide for the payment of interest to begin to accrue as of the latter date on all fees and expenses approved for payment as a result of litigation before the OALJ.

The foregoing considered, the following Order is issued.

ORDER

(1) Daniel Construction Company shall pay directly to Michael Okun, Esq., the sum of $15,125.00 for legal fees in connection with litigation of this matter before the Office of Administrative Law Judges.

(2) Daniel Construction Company will reimburse Michael Okun for out-of-pocket expenses encountered in connection with the litigation in the total amount of $840.29.

(3) Beginning with 11/1/86 Daniel Construction Company will pay interest on any sums due Michael Okun as a result of paragraphs (1) and (2) above at the rate specified in 28 U.S.C. § 1961 in effect on that date.

JOHN C. BRADLEY
Administrative Law Judge

JCB/llk

[ENDNOTES]

[1] Okun's listing of hours spent totals only 208.5 hours.

[2] The *English* case is one in which, in support of a requested award of approximately $543,000.00, complainant's counsel (2114 hours) and co-counsel (923.50 hours) combined to allege over 3,000 hours in an ERA "whistleblower" case, reduced by the ALJ to 717.75 hours. The undersigned is tolerably familiar with that case and various of its facets. The English case is sui generis, as the bare facts cited would suggest, and it has no precendential value in any other proceeding involving the award of attorney's fees.

[3] The criteria formulated therein have been accepted by the Supreme Court, *Hensley, supra*, 461 U.S. at 430, *Blum v. Stenson*, 465 U.S. 886, 894 (1984); by the Fourth Circuit, *Barber v. Kimbrell's Inc.*, 577 F.2d 216, 226 (CA4 1978), *Daly, supra*, 790 F.2d at 1077; and by Congress, *Blum, supra*, 465 U.S. at 897.

[4] This contention is somewhat at odds with Okun's statement that he was compensated at the rate of $250.00 per hour in another case which was "handled at the same time as the instant case." With respect to the rate claimed, Daniels has represented that there was a stipulated dismissal in the matter Okun referred to, and, absent more information, the matter has no precendential value here. Somewhat incongruously, Okun represented that in May, "Counsel spent 15 week days, *and most weekends*, working past normal hours * *" (M-4). This statement will not withstand analysis. During the 4 weekends in May preceding the hearing, Okun logged a total of 8.75 hours in this case, 4 hours each having been shown for Saturday, 5/17 and Sunday, 5/18/86. If he meant that he worked weekends on other matters, then he was not precluded by this case from handling them.

[5] These elements would better be weighed when considering the reasonableness of the number of hours claimed, *Blum*, supra, 465 U.S. at 898.

[6] Included in this experience has been the interviewing of many hundreds of witnesses at a variety of points in an estimated 33 different States.

[7] It is not concluded that Okun's time records bear "facial indicia of exaggeration", as found in *Ballard v. Schweiker*, 724 F.2d 1094, 1097 (CA4 19 84), but merely that portions of his time were not productively expended.

[8] 641 F.2d at 891.

[9] 641 F.2d at 892-893.

[10] 641 F.2d at 902.

[11] It is understood that the recommended decision has been contested before the Secretary of Labor, which, depending how long the Litigation at that level takes, could cause the amount of back pay involved to escalate sharply, assuming Complainant continues to prevail.